92

Supreme Court, U.S.
FILED

No. (1) 071464 MAY 22 2008

OFFICE OF THE CLERK

In The

Supreme Court of the United States

TIMOTHY DELLAS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

EPHRAIM MARGOLIN
Counsel of Record
240 Stockton St., 4th Floor
San Francisco, CA 94102
Telephone: (415) 421-4347

Counsel for Petitioner
Timothy Dellas

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Do the provisions of the federal Controlled Substances Act that provide for extremely harsh sentences for marijuana offenses violate due process because they are based on commission findings that *refute* the laws Congress intended the findings to support?

LIST OF PARTIES

There were no parties in addition to petitioner Timothy Dellas.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	3
CONCLUSION	11
APPENDIX A: Memorandum Opinion Denying Appeal, dated February 19, 2008	App. 1
APPENDIX B: Judgment in a Criminal Case, filed January 22, 2007	App. 7
APPENDIX C: Order Denying Petition for Rehearing *En Banc*, dated March 31, 2008	App. 19
APPENDIX D: 21 U.S.C. § 841, in pertinent part	App. 20

TABLE OF AUTHORITIES

Page

CASES

Castleton v. Sinclair, 264 U.S. 543 (1924) 4

Delaware River Basin Commission v. Bucks County, 641 F.2d 1087 (3d Cir. 1981) 3

Gonzales v. Raich, 545 U.S. 1 (2005) 5

Jimenez v. Weinberger, 417 U.S. 528 (1974) 3

Leary v. United States, 395 U.S. 6 (1969) 3, 9, 10

Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990).....4

Schumacher v. Nix, 965 F.2d 1262 (3d Cir. 1992).....4

South Carolina Highway Department v. Barnwell Brothers, 303 U.S. 177 (1938) 4

United States v. Caroline Products Co., 304 U.S. 144 (1938).....4

Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56 (9th Cir. 1994) 4

STATUTES

18 U.S.C. § 3231 2

21 U.S.C. § 801 5

21 U.S.C. § 841 2

28 U.S.C. § 1254 1

28 U.S.C. § 1291 2

H.R. Rep. No. 91-1444 5

Pub. L. No. 105-277 10

OPINIONS BELOW

The panel opinion affirming Dellas' conviction and sentence appears at Appendix A. The Judgment in a Criminal Case by the district court appears at Appendix B. Appendix C consists of the Ninth Circuit's order denying *en banc* review.

JURISDICTION

On February 19, 2008, the Court of Appeals for the Ninth Circuit entered judgment, App. A, and denied petitioner's timely filed petition for rehearing *en banc* on March 31, 2008, App. C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

> deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U.S.C. § 841 is set forth in the Appendix at App. 20.

STATEMENT OF THE CASE

Petitioner Dellas was sentenced to a statutorily-mandated minimum term of ten years imprisonment for cultivating marijuana. App. B. He appealed his conviction and sentence on multiple grounds, primarily contending that the federal prohibitions on marijuana cultivation and possession do not have a rational basis and, therefore, violate due process. Dellas contends that the district court, which had jurisdiction over the criminal action under 18 U.S.C. § 3231, erred in failing, at a minimum, to grant his request for an evidentiary hearing to demonstrate the merit of his due process claim, a claim over which the Court of Appeals had jurisdiction, pursuant to 28 U.S.C. § 1291. By an unpublished decision, dated February 19, 2008, a panel of this Circuit denied Dellas' appeal. App. A. A timely request for rehearing *en banc* followed on March 4, 2008, and was denied on March 31, 2008. App. C.

REASONS FOR GRANTING THE PETITION

The panel decision of the Ninth Circuit affirmed the constitutional validity of the federal Controlled Substances Act CSA as it was harshly applied against Petitioner Dellas, in conflict with decisions of this Court requiring due process for all. The federal laws regulating marijuana are unconstitutional as they were so harshly applied against Petitioner because they do not meet the minimum requirements of due process required by this Court. When the federal CSA was enacted in 1970, Congress relied on a commission to supply the rational basis for the marijuana laws, but the commission's findings did the opposite, essentially stating that such laws are irrational. These laws violate due process under the standards articulated by this Court both because they rely upon commission findings that refute them and destroy lives without accomplishing their purpose.

A. Legal Standards

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . deprived of . . . liberty . . . without the due process of law. . . ." This, in turn, requires that criminal laws have a rational basis and are not arbitrary. *Leary v. United States*, 395 U.S. 6 (1969). Laws that cannot meet this minimum rationality requirement are constitutionally infirm. *See, e.g., Jimenez v. Weinberger*, 417 U.S. 528, 537 (1974); *Delaware River Basin Commission v. Bucks County*, 641 F.2d 1087 (3d Cir. 1981).

While the courts' rational basis test provides for judicial deference to the legislative judgments of Congress, it is not a mere rubber stamp. *See South Carolina Highway Department v. Barnwell Brothers*, 303 U.S. 177 (1938); *Schumacher v. Nix*, 965 F.2d 1262, 1269 (3d Cir. 1992). To withstand constitutional scrutiny, a law must bear a rational relationship to a legitimate government purpose. *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 67 (9th Cir. 1994); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990). The inquiry is an evolving one, with the rationality of the law at issue judged by the currently available information, not just the information available to Congress when it enacted the law. *See United States v. Caroline Products Co.*, 304 U.S. 144, 153 (1938) ("The constitutionality of a statute predicated upon a particular state of facts may be challenged by a showing to the court that those facts have ceased to exist."); *Castleton v. Sinclair*, 264 U.S. 543, 547-48 (1924) ("regulations under the police power, although valid or presumed valid when made, may become arbitrary and irrational in the light of later events"). "[T]he rational relation test will not sustain conduct by state officials that is . . . irrational, or plainly arbitrary." *Lockary*, 917 F.2d at 1155.

B. The CSA's Proscription of Marijuana and Its Extremely Harsh Mandatory Penalties Violate Equal Protection and Due Process

Judged by these appropriate standards, the panel's decision is erroneous. When Congress enacted the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* ("CSA") in 1970, it did not make any specific findings regarding marijuana. Instead, it recognized that it was unsure about the harms associated with marijuana and its medical benefits. *See* H.R. Rep. No. 91-1444, Pub. L. No. 91-513, U.S. Code Cong. & Admin. News 1970, pp. 4566, 4629 ("Since there is still a considerable void in our knowledge of the plant and effects of the active drug contained in it, our recommendation is that marihuana be retained within Schedule I at least until the completion of certain studies now underway to resolve this issue.") (quoting letter from Roger Egeberg, M.D.O. to the Hon. Harley O. Staggers, dated August 14, 1970); *Gonzales v. Raich*, 545 U.S. 1, 14 & n.22 (2005). To supply the factual basis for its criminal prohibitions on marijuana, Congress convened a Commission on Marihuana and Drug Abuse in 1970. *See* H.R. Rep. No. 91-1444, Pub. L. No. 91-513, U.S. Code Cong. & Admin. News 1970, pp. 4566, 4625-26.[1]

---

[1] SECTION 601. ESTABLISHMENT OF COMMISSION ON MARIHUANA AND DRUG ABUSE

This Section provides for the appointment of a Commission on Marihuana and Drug Abuse, composed of two members from

(Continued on following page)

each house, and nine members appointed by the President. The Commission is directed to conduct a study of marihuana, including but not limited to –

(1) the extent of marihuana use in the United States;

(2) the efficacy of existing marihuana laws;

(3) the pharmacology of the drug and its immediate and long-term effects, both physiological and psychological;

(4) the relationship of marihuana use to aggressive behavior and crime;

(5) the relationship between marihuana and the use of the other drugs; and

(6) the international control of marihuana. The Commission is directed to submit, within 1 year after the date funds first become available to carry out the study, to the President and Congress a comprehensive report on this study, including its recommendations and proposals for legislative and administrative action.

The Commission is further directed to conduct a comprehensive study of the causes of drug abuse (not limited to marihuana use) and their relative significance to, make such interim reports as it deems advisable, and within 2 years after the date funds first become available to carry out the study to submit to the President and Congress a final report, including such legislative and administrative recommendations as it deems appropriate. It is the intent of the Committee that the Commission should include in its study an examination of such subjects as the relationship, if any, to drug abuse by the young of individual personality with reference to personality traits which may make an individual prone to drug abuse; peer group relationships; patterns of family relations which appear to provide greater susceptibility than others to drug abuse; the degree to which societal tensions within the immediate community and nation relate to drug abuse, including consideration of poverty, urban decay, war, and social permissiveness; availability and exposure to hard drugs; leisure activity; personal and family use of alcoholic beverages

(Continued on following page)

The Commission, however, not only did not legitimize the harsh federal penalties for marijuana offenses, but it essentially found that Congress was acting irrationally. In its first report, "Marihuana: A Signal of Misunderstanding," the Commission concluded that the public perception of the dangers of marijuana were "based much more on fantasy than on proven fact" and "the weight of the evidence is that marihuana does not cause violent or aggressive behavior, if anything, marihuana generally serves to inhibit the expression of such behavior." *See* Shafer, Raymond P. *et al.*, *Marihuana: A Signal of Misunderstanding*, Ch. III (First Report of the National Commission on Marihuana and Drug Abuse, 1972); *see also id.* ("In essence, neither informed current professional opinion nor empirical research, ranging from the 1930's to the present, has produced systematic evidence to support the thesis that marihuana use, by itself, either invariably or generally leads to or causes crime, including acts of violence, juvenile delinquency or aggressive behavior"). The Commission recommended the decriminalization of marijuana possession, finding:

> [T]he criminal law is too harsh a tool to apply to personal possession even in the effort

---

and drugs; movies, lyrics or rock music; advertising; underground newspapers; and other influences in the general social environment.

This Section provides that the Commission's total expenditures shall not exceed $1 million.

> to discourage use. It implies an overwhelming indictment of the behavior which we believe is not appropriate. The actual and potential harm of use of the drug is not great enough to justify intrusion by the criminal law into private behavior, a step which our society takes only with the greatest reluctance.

Id. Furthermore, the Commission found that the constitutionality of marijuana prohibition was suspect, and that the executive and legislative branches had a responsibility to obey the Constitution, even in the absence of a court ruling to do so:

> While the judiciary is the governmental institution most directly concerned with the protection of individual liberties, all policymakers have a responsibility to consider our constitutional heritage when framing public policy. Regardless of whether or not the courts would overturn a prohibition of possession of marihuana for personal use in the home, we are necessarily influenced by the high place traditionally occupied by the value of privacy in our constitutional scheme.

Id. The Commission concluded: "The existing social and legal policy is out of proportion to the individual and social harm engendered by the use of the drug." *Id.*

Not only did Congress not heed the Commission's recommendations, but it maintained its extremely harsh penalties for marijuana cultivation and possession and, since then, the executive branch has significantly

ramped up enforcement efforts. As a result, many lives, like that of petitioner Dellas, have been destroyed. In 2006, 6,423 defendants were sentenced for marijuana-related charges in federal courts. *See* United States Sentencing Commission, *2006 Sourcebook of Federal Sentencing Statistics* (2007). With draconian penalties imposed, there are now annually more than ten thousand federal inmates behind bars for marijuana offenses. *See* Bureau of Justice Statistics, *Drug Use and Dependence, State and Federal Prisoners* (2004). Despite this, the number of college students who reported daily use of marijuana has increased from 3.7 percent in 1995 to 4.0 percent in 2005. United States Department of Justice, *Bureau of Justice Statistics, Drugs and Crime Facts* (revised April 11, 2007). And, among high schoolers, the increase is even more pronounced – from 12 percent in 1992 to 20 percent in 2005 who reported monthly marijuana use. United States Department of Justice, *Bureau of Justice Statistics, Drugs and Crime Facts* (revised April 11, 2007). Because of this, as evidenced by the fact that several states have attempted to relax marijuana laws in the face of federal government objection, the public remains caught in its suspicions of government irrationality.

The federal marijuana laws are irrational, and violate due process, both because they rely upon commission findings that refute them and they destroy lives without accomplishing their purpose. Under the test articulated by this Court in *Leary*, these laws, as applied to Dellas, are unconstitutional.

Cf. Leary v. United States, 395 U.S. 6, 48-54 (1969) (holding that statute authorizing jury to infer from defendant's possession of marihuana that defendant knew that marihuana was illegally imported or brought into the United States was invalid under due process clause after surveying mass of reports, studies and articles on marijuana cultivation; "A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge, a court must, of course, be free to reexamine the factual declaration.").

Rather than address these arguments, the panel that denied Dellas' appeal cites a statement from Congress in 1998 that it "continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana." *See* Memorandum Order (attached hereto) at 3 (quoting Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Division F, § 11, 112 Stat. 2681, 2681-761 (1998)). This, however, does not respond to Dellas' argument, as Congress still has failed to provide a rational basis for its marijuana laws, its repeated and conclusory announcement that it will maintain them notwithstanding. This case involves an extremely important question of law, which affects the lives of more than ten thousand persons.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the panel's erroneous decision that conflicts with this Court's requirements of due process.

DATED: May 22, 2008

Respectfully submitted,

EPHRAIM MARGOLIN

Counsel of Record for Petitioner Timothy Dellas

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TIMOTHY DELLAS, Defendant-Appellant.	No. 07-10060 D.C. No. CR-03-00226-MHP MEMORANDUM* (Filed Feb. 19, 2008)

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Submitted February 11, 2008**
San Francisco, California

Before: D.W. NELSON, KLEINFELD, and HAWKINS, Circuit Judges.

Timothy Dellas ("Dellas") appeals his conviction for manufacturing marijuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(vii), and possession with intent to distribute marijuana in violation of

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 841(a)(1) and (b)(1)(A)(vii). For the following reasons, we affirm.

I. Constitutionality of 21 U.S.C. § 841

Dellas's constitutional attack on the statutes he violated has no merit. What this court stated in 1978 still holds true today: "[T]he constitutionality of the marijuana laws has been settled adversely to [Dellas] in this circuit." *United States v. Miroyan,* 577 F.2d 489, 495 (9th Cir. 1978).

Dellas distinguishes his constitutional attack from those of previous parties who have appeared before this court. He directs the court's attention to the Comprehensive Drug Abuse Prevention and Control Act of 1970, and the commission it established to study, among other things, marijuana's pharmacology and its relation to crime, aggressive behavior, and the use of other drugs. Pub. L. No. 91-513, § 601, 84 Stat. 1236, 1280-81. Citing that commission's findings and more recent studies, he asserts that the evidence demonstrates that marijuana "is not harmful and has medical use." He argues that Congress was constitutionally irrational when it "relied on the yet-to-be-released findings of the National Commission on Marihuana and Drug Abuse to justify its harsh marijuana laws," because "the Commission's Report wholly undermined Congress' actions."

For the sake of argument, we can stipulate: (1) that Dellas accurately interprets the scientific

evidence, and (2) that, in some circumstances, a law could be declared violative of due process because the factual assumptions underlying the law have been subsequently disproved, and the legislature has failed to respond in any manner. Even with these stipulations, Dellas's challenge fails. In 1998, Congress explained that it "continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana." Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Division F, § 11, 112 Stat. 2681, 2681-761 (1998). This legislation reveals that Congress considered marijuana regulation long after the commission reported its findings. Further, Congress's desire not to rush to judgment is rational. The district court did not abuse its discretion in denying Dellas's request for an evidentiary hearing on this issue. *United States v. Smith,* 155 F.3d 1051, 1063 n.18 (9th Cir. 1998).

II. Constructive Amendment/Variance

Dellas claims that his indictment was constructively amended, or that there was a significant variance from the indictment brought about by the judge's instructions and the prosecution's evidence, which he asserts enabled the jury to convict him of aiding and abetting, even though his indictment contained no such charge.

As a preliminary matter, there is a conceptual problem with this argument. Under our case law, "aiding and abetting is embedded in every federal indictment for a substantive crime." *United States v. Garcia,* 400 F.3d 816, 820 (9th Cir. 2005). Thus, even though Dellas's indictment did not explicitly charge him with aiding and abetting, he was on notice that the government could validly present that theory at trial.

Nevertheless, because the district court cited the indictment as grounds for refusing to give the jury a preliminary instruction on aiding and abetting, we assume, without deciding, that Dellas's argument has some potential to be successful.

Dellas's challenge fails because the district court never issued an aiding and abetting instruction, and, therefore, the jury is presumed to have convicted Dellas as a principal. *See United States v. Heredia,* 483 F.3d 913, 923 (9th Cir. 2007) (en banc) ("A jury is presumed to follow the instructions given to it. . . .").

Moreover, "evidence not referenced in the indictment may be admitted for impeachment or other legitimate purposes, without effecting any changes to the indictment." *United States v. Bhagat,* 436 F.3d 1140, 1146 (9th Cir. 2006) (internal quotation marks omitted). In order to demonstrate the depth of Dellas's involvement in the commercial marijuana grow, the government introduced evidence, such as financial records, that incidentally implicated third parties. Although this evidence may have supported an

aiding and abetting theory, it was also consistent with prosecuting Dellas as a principal.

Finally, after reviewing the prosecution's summation, we conclude that any misstatements of law that may have been made were sufficiently slight as to have been rendered harmless by the judge's jury instructions. *See United States v. Mendoza,* 244 F.3d 1037, 1045 (9th Cir. 2001).

III. Rule 30 Objection

Dellas's final challenge invokes Rule 30 of Criminal Procedure. He argues that the judge's supplemental jury instruction defining "manufacture" was "the functional equivalent of an aiding and abetting instruction." We disagree. The supplemental instruction was faithful to the statutory scheme, and it did not license the jury to convict Dellas for aiding, abetting, counseling, commanding, inducing, or procuring a violation of 21 U.S.C. § 841, or for willfully causing another to violate the statute. *See* 18 U.S.C. § 2.

To the extent Dellas is challenging the discrepancy between the judge's initial and supplemental instructions, he has been unable to show that the slightly more expansive supplemental instruction prejudicially affected him, because it does not appear that he was "substantially misled in formulating and presenting arguments." *See United States v. Gaskins,* 849 F.2d 454, 458 (9th Cir. 1988). The supplemental instruction informed the jury that the examples provided in the statutory definition of "production,"

21 U.S.C. § 802(22), "do not purport to be an all inclusive list." Dellas has not convinced us that he could have altered his summation in a meaningful way to account for this minor variation.

AFFIRMED.

APPENDIX B

United States District Court
Northern District of California

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: CR 03-0226-01 MHP
TIMOTHY DELLAS	USM Number: J. David Nick (Retained) Defendant's Attorney (Filed Jan. 22, 2007)

THE DEFENDANT:

[ ] pleaded guilty to count(s): ___.

[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.

[x] was found guilty on count(s) One and Two of the Indictment after a plea of not guilty, and after a jury trial finding the defendant guilty of Counts One and Two on May 4, 2006.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1) & (b)(1)(A)(vii)	Manufacture of Marijuana	June 9, 2003	One

21 U.S.C. § 841(a)(1) & (b)(1)(A)(vii)	Possession with Intent to Distribute Marijuana	June 9, 2003	Two

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ___.

[ ] Count(s) ___ (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

1/12/07
Date of Imposition of Judgment

/s/ Marilyn Hall Patel
Signature of Judicial Officer

Honorable Marilyn Hall Patel,
U.S. District Judge
Name & Title of Judicial Officer

1/19/07
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months.

[x] The Court makes the following recommendations to the Bureau of Prisons:

that the defendant serve his term of imprisonment at the federal camp at Lompoc, CA; or, in the alternative, at the federal facility at Sheridan, OR.

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at _____ [ ] am [ ] pm on _____.

[ ] as notified by the United States Marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[x] before 12:00 p.m. on 3/12/07. In the alternative, defendant is to report by that time and date to the U.S. Marshals Service Office at 450 Golden Gate Ave., 20th Floor, San Francisco, CA 94102.

[x] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and two periodic drug tests thereafter.

[ ]The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[x]The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check if applicable.)

[x]The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ]The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable).

[ ]The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions in this judgment.

STANDARD CONDITIONS

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court; and

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1) The defendant shall pay any special assessment that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release.

2) The defendant shall provide the probation officer access to any requested financial information, including tax returns, and shall authorize the probation office to conduct credit checks and obtain copies of the income tax returns.

3) The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance.

4) The defendant shall make an application to register as a drug offender pursuant to state law.

5) The defendant shall not be in the vicinity of or associate with other drug traffickers, unless otherwise approved by the probation officer.

6) The defendant shall participate in a program of testing and treatment for drug abuse, as directed by the probation officer, until such time as the defendant is released from treatment by the probation officer. The defendant is to pay part or all of the cost of this treatment, at an amount not to exceed the cost of treatment, as deemed appropriate by the probation officer. Payments shall never exceed the cost of urinalysis and counseling. The actual co-payment schedule shall be determined by the probation officer.

7) The defendant shall submit his person, residence, office, vehicle, or any property under his control to a search. Such a search shall be conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based

upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to such a search may be grounds for revocation; the defendant shall warn any residents that the premises may be subject to searches.

8) The defendant shall not own or possess any firearms, ammunition, destructive devices, or other dangerous weapons.

9) The defendant shall cooperate in the collection of DNA as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$200.00	$	$

[ ] The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However,

pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	$ _____	$ _____	

[ ] Restitution amount ordered pursuant to plea agreement $_____

[ ] The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] the interest requirement is waived for the [ ] fine [ ] restitution.

[ ] the interest requirement for the [ ] fine [ ] restitution is modified as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [x] Lump sum payment of $200.00 due immediately, balance due

[x] not later than 1/26/07, or

[ ] in accordance ( ) C, ( ) D, ( ) E, or ( ) F below; or

B [ ] Payment to begin immediately (may be combined with ( ) C, ( ) D, or ( ) F below); or

C [ ] Payment in equal (e.g. weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in equal (e.g. weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within (e,g, 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and co-defendant Names	Case Numbers (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee (if appropriate)

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TIMOTHY DELLAS, Defendant-Appellant.	No. 07-10060 D.C. No. CR-03-00226-MHP Northern District of California, San Francisco ORDER (Filed Mar. 31, 2008)

Before: D.W. NELSON, KLEINFELD, and HAWKINS, Circuit Judges.

Judge Nelson recommended denying the petition for rehearing en banc. Judges Kleinfeld and Hawkins voted to deny the en banc petition.

The full court was advised of the petition for rehearing en banc and no Judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

APPENDIX D

21 U.S.C.A. § 841 provides, in pertinent part:

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in *section 859, 860,* or *861* of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

. . .

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

. . .

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of *Title 18, or $4*,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of *Title 18, or $8*,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of *section 849*, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding *section 3583 of Title 18*, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release

of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

. . . .